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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 589

JAMES G. MCCONKEY AND CLAUDINE W. MCCONKEY, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 18-22) is reported at 199 F. 2d 892. The Tax Court wrote no opinion.

### JURISDICTION

The judgment of the Court of Appeals (R. 22-23 was entered on November 10, 1952. The petition for a writ of certiorari was filed on February 6, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the Tax Court had jurisdiction to review the action of the Commissioner of Internal Revenue in purporting to assert a deficiency in income tax against taxpayers where the amount proposed as a deficiency had in fact been paid to the Collector of Internal Revenue, without assessment, prior to the date on which the Commissioner's statutory notice was mailed.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 271 [as amended by Sec. 14(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. DEFINITION OF DEFICIENCY.
>
> (a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—
>
> (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates, as defined in subsection (b)(2), made.
>
> (b) *Rules for Application of Subsection (a).*—For the purposes of this section—
>
> (1) The tax imposed by this chapter and the tax shown on the return shall both be

determined without regard to payments on account of estimated tax, without regard to the credit under section 35, and without regard to so much of the credit under section 32 as exceeds 2 per centum of the interest on obligations described in Section 143(a):

(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by this chapter was less than the excess of the amount specified in subsection (a) (1) over the amount of rebates previously made; and

* * * * *

(26 U.S.C. 1946 ed., Sec. 271.)

SEC. 272 [as amended by Sec. 168(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 203(a) of the Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax im-

posed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred fifty days in lieu of ninety days.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

STATEMENT

This case was decided by the Tax Court on the respondent's motion to dismiss (R. 14-15). The facts, as stated in the opinion of the Court of Appeals (R. 18-19), may be summarized as follows:

This proceeding involves the federal income tax liability of James G. McConkey and his wife, Claudine W. McConkey, for the calendar year 1947. After an internal revenue agent had tentatively proposed a deficiency in tax against the taxpayers for 1947 they paid to the Collector of Internal Revenue the amount of the tentative deficiency, with interest. The payments were accepted by the Collector as "Payments in Suspense". (R. 1-2, 3, 18). Subsequent to the payments mentioned the Commissioner sent the taxpayers what purported to be a statutory notice of deficiency pursuant to Section 272(a) of the Internal Revenue Code, asserting a deficiency in tax in the amount found by the Internal Revenue agent, and advised the taxpayers of their right to appeal to the Tax Court. (R. 8-11). The taxpayers took a timely appeal to the Tax Court. (R. 4-8.)

No assessment of the tax had been made prior to the time the money was paid to the Collector, at the time the notice of deficiency issued, or at the time the appeal was taken to the Tax Court. (R. 19.) The Commissioner moved to dismiss the appeal on the ground that since the full amount due had been paid prior to the mailing of the notice of deficiency, there was no deficiency in tax, and the Tax Court was therefore without jurisdiction. (R. 13-14, 19.) The Tax Court granted the motion to dismiss (R. 14-15, 19), and the Court of Appeals affirmed (R. 18-22).

ARGUMENT

1. Petitioners' contention (Pet. p. 6) that the decision of the court below "is in conflict with long-established law" is without merit. The precise question presented here was decided adversely to petitioners' contention by the Tax Court in *Anderson* v. *Commissioner*, 11 T.C. 841, which the court below cited with approval (R. 21). The cases of *H. Milgrim & Bros., Inc.* v. *Commissioner*, 24 B. T. A. 853, and *O'Meara* v. *Commissioner*, 11 B. T. A. 101, relied upon by petitioners, contain general statements to the effect that the mere fact that the Commissioner's determination is erroneous will not oust the Board (now the Tax Court) of jurisdiction. But those cases involved consolidated returns and cannot be properly said to have established law which applies to the factual situation presented in the instant case.

2. Petitioners contend, in effect, that the court below erred in holding that the Tax Court had no jurisdiction, since they filed a proceeding in that court based on a notice by the Commissioner that they owed a deficiency in tax, notwithstanding the fact that the amount in issue had already been placed in the Collector's hands (Pet. p. 3). But their contention disregards both the basic purpose for which the Board of Tax Appeals (now the Tax Court) was created and the definition of the term "deficiency" established by Congress. The purpose for which the Board was established was to provide a forum where taxpayers could obtain a judicial determination of their liability for the

particular year or years involved in advance of payment of any "deficiency" asserted against them. *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716, 721; H. Rep. No. 179, 68th Cong., 1st Sess., p. 62 (1924) (1939-1 Cum. Bull. (Part 2) 241, 258); S. Rep. No. 398, 68th Cong., 1st Sess., p. 30 (1924) (1939-1 Cum. Bull. (Part 2) 266, 287); H. Rep. No. 1, 69th Cong., 1st Sess., p. 10 (1925) (1939-1 Cum. Bull. (Part 2) 315, 321-322); S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25-28 (1926) (1939-1 Cum. Bull. (Part 2) 332, 351-353). Compare *Phillips* v. *Commissioner,* 283 U. S. 589.

A "deficiency" for the purpose of the provision of law conferring jurisdiction on the Tax Court is defined in Section 271(a) of the Code, *supra,* p. 2. As the court below pointed out (R. 19), so far as this case is concerned, a "deficiency" within the meaning of Section 271 "would be the excess of the correct tax due, as determined by the Commissioner, over the amount shown on the return plus any amounts previously assessed or collected without assessment." Here, there was, of course, no such excess amount due from the taxpayers. Hence, in fact and in law, there was no "deficiency" and the Commissioner's action in purporting to determine a deficiency was nugatory. Petitioners' argument that the jurisdiction of the Tax Court should be predicated solely on the Commissioner's "notice of deficiency" even though the tax liability determined by the Commissioner in his "notice" corresponded exactly with the liability shown on the return plus the amount sub-

sequently collected without assessment is clearly not in harmony with Section 272(a)(1) of the Internal Revenue Code, *supra*, pp. 3-4.

By giving taxpayers the alternative remedy of proceeding in the Tax Court, Congress did not infringe upon their right to pay any additional tax assessed against them and sue for a refund in a United States District Court or other proper federal court. The new remedy was merely cumulative. If a taxpayer chooses to pay any additional amount proposed to be assessed against him as a deficiency, as was done in this case, before the Commissioner has made an official determination that there is a deficiency, he has forfeited the statutory remedy afforded him of proceeding in the Tax Court, and has instead elected to pursue the alternative remedy of payment and suit for refund. Upon payment in advance of the Commissioner's determination the very basis of his right to proceed in the Tax Court has ceased to exist. The Court of Appeals rightly said (R. 22) that in such circumstances a taxpayer may not compound these two mutually independent procedures by taking a part of one procedure and a part of the other. In other words, he cannot pay the tax, and then, upon an erroneous determination of a deficiency by the Commissioner, where there is in fact no deficiency because the full amount has been placed in the hands of the Collector, seek a review by the Tax Court.

3. Petitioners assert (Pet. 6) that the reasoning

of the court below applied equally to cases where taxpayers, in order to save interest, elect to pay the deficiency after appealing to the Tax Court, and that the Tax Court in such cases necessarily would lose jurisdiction because of that fact. This assertion fails to take into account the statutory provisions relating to the jurisdiction of the Tax Court. Section 272(a)(1), *supra*, pp. 3-4, of the Internal Revenue Code requires the Commissioner to first send a notice of deficiency, except in cases of jeopardy, and prohibits him from assessing and collecting the deficiency for 90 days thereafter during which time the taxpayer may appeal to the Tax Court. If a timely petition is filed with the Tax Court the prohibition against assessment and collection is continued until after the decision of the Tax Court has become final. Subsection (d) of Section 272, however, provides that the taxpayer "shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency", and under Section 292(a) of that Code interest on any amount with respect to which the taxpayer has filed such a waiver can be charged only to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed, whichever is earlier. If a timely petition is filed and the Tax Court at once acquires jurisdiction, it will not lose jurisdiction upon the filing of a waiver

under Section 272(d) and payment of the deficiency. See *De Sabichi* v. *Commissioner*, 4 B.T.A. 445.

## CONCLUSION

The decision of the Court of Appeals is correct, there is no conflict of decisions, and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MARCH, 1953.

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